c.c. White House
Mig - S. 2543

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OLC 74-1154
29 May 1974

MEMORANDUM FOR THE RECORD

SUBJECT: Meeting at the White House on S. 2543

STATINTL

1. Today, [redacted] and I attended an interagency session in the White House summoned by Bill Timmons, Assistant to the President for Legislative Affairs, to discuss tactics for tomorrow for Senate consideration of the Freedom of Information Act amendments, particularly the Muskie amendment bill which would strike the current presumption favoring an agency head who submits an affadavit to the court that he has reviewed the material in question and it should not be released under existing Executive Order or statute. The following points emerged:

a. The Administration does not want to officially adopt the compromise and foreclose its option for veto or challenging it on constitutional grounds (the constitutional grounds include whether the Judiciary can break Executive classification, the effectiveness of sanctions in the bill, including removal of officers when they are presidential appointees over whom only the President exercises removal power and the inherent authority of the President in the field of foreign relations).

b. It was generally concluded that the bill emerging out of conference would be even less acceptable than the compromise (this might not necessarily be true for the Agency since the House report does not envisage Judicial review of withholdings authorized by statute, i.e., "Restricted Data". Communication Intelligence and Intelligence Sources and Methods, we assert, fall in the same category).

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c. Vince Rakestrow of Justice believes he has enough votes to beat the Muskie amendment (this is doubtful since Muskie already has 21 co-sponsors). I said that Doug Marvin, Senator Roman L. Hruska's, (R., Neb.), key man on the legislation, had just told me that it would be very close and Paul Summitt, Senator John L. McClellan's, (D., Ark.), Chief Counsel, is very pessimistic.

d. Mark Feldman of State said that one answer to the legislation is to beef up the ICRC structure, and spend more throughout Government on the declassification program under the implementing National Security Council directive.

e. I said that we had accepted the compromise on the basis of our evaluation that it is the best that we can expect but pointed out that we did have a case on the born classified concept which Bob Dixon of Justice appeared to find interesting.

f. I said that one untapped resource in the Senate appeared to be the Joint Committee on Atomic Energy since the Muskie amendment would subject Restricted Data to court review, a paradox since the unauthorized disclosure of same constitutes a criminal offense. I asked who could possibly get to Senator John O. Pastore, (D., R.I.), on this issue and Pat O'Donnell, Special Assistant to the President, suggested Tom Korologos, Deputy Assistant to the President for Legislative Affairs, and asked if we would send over a short talking paper for Korologos to use with Senator Pastore the first thing tomorrow morning.

2. All in attendance were urged to work with their contacts on the Hill.

[redacted] STATINTL

Acting Legislative Counsel

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on the Federal-aid secondary system and the Federal share payable on account of any project shall be determined in accordance with section 120(a) of this title.

'(b) Not later than July 1, 1977, the Secretary shall issue regulations to administer the provisions of this section relating to assistance for rural public transportation service. In issuing such regulations, the Secretary shall take into account the results of the Rural Highway Public Transportation Demonstration program authorized by section 147 of the Federal Aid Highway Act of 1973. Upon the issuance of these regulations the Secretary is authorized, if he finds it to be in the public interest, to approve as a project under this section the payment of operating expenses incurred as a result of providing public transportation service on highways in rural and small urban areas. To the extent that Federal funds are utilized to pay such operating expenses, such funds shall be supplementary to and not a substitution for the average amount of State and local government funds expended on the operation of public transportation service for the two Federal fiscal years preceding the fiscal year for which the project is intended.

'(C) For the purposes of this section, the term "public road" means any road under the jurisdiction of and maintained by a public authority and opened to public travel.' "

2. Title I of the bill is amended by amending paragraphs (2) and (3) of section 106(a) (respecting authorizations for fiscal year 1977) to read as follows:

"(2) For the Federal-aid primary system in rural areas, out of the Highway Trust Fund, $730,000,000 for the fiscal year ending June 30, 1977.

"(3) For the Federal-aid secondary system in rural areas, out of the Highway Trust Fund, $425,000,000 for the fiscal year ending June 30, 1977."

STANDBY ENERGY EMERGENCY AUTHORITIES ACT—AMENDMENT

AMENDMENT NO. 1355

(Ordered to be printed and to lie on the table.)

Mr. MATHIAS (for himself, Mr. ERVIN, and Mr. JAVITS) submitted an amendment intended to be proposed by them jointly to the bill (S. 3267) to provide standby emergency authority to assure that the essential energy needs of the United States are met, and for other purposes.

AMENDMENT NO. 1357

(Ordered to be printed and to lie on the table.)

Mr. McINTYRE submitted an amendment intended to be proposed by him to the bill (S. 3267), supra.

FREEDOM OF INFORMATION ACT—AMENDMENT

AMENDMENT NO. 1356

(Ordered to be printed and to lie on the table.)

Mr. MUSKIE (for himself, Mr. ERVIN, Mr. JAVITS, Mr. SYMINGTON, Mr. HART, Mr. CHILES, Mr. HUMPHREY, Mr. McGOVERN, Mr. GRAVEL, Mr. CLARK, Mr. TUNNEY, Mr. METCALF, Mr. MONDALE, Mr. RIBICOFF, Mr. MATHIAS, Mr. HATHAWAY, Mr. PERCY, and Mr. BURDICK) submitted an amendment intended to be proposed by them jointly to the bill (S. 2543) to amend the Freedom of Information Act.

Mr. MUSKIE. Mr. President, the Freedom of Information Act provides that agencies are permitted to withhold from the public classified information relating to national defense or foreign policy (exemption 1). The amendment I submit today to S. 2543 would in no way alter that protection for sensitive military or diplomatic data. It would only provide that suits contesting the propriety of agency claims under the first exemption would be handled by Federal judges in the same way as cases challenging the validity of claims under the eight other permissive exemptions from the act's disclosure standards.

The purpose of the deletion I propose is to preserve for judges the freedom to conduct complete de novo review of Freedom of Information Act cases in which information is withheld by agencies under the claim that it falls within exemption 1 of the act, permitting withholding for material "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy"—that is, classified information. The language of section (b) (4) (B) (ii) would, if left in the statute, give a special status to exemption 1 material, unlike that accorded any other claimed Government secrets. The subsection would substitute for de novo judicial review of the Government's case for withholding (with the burden on the Government to sustain its action) an arrangement shifting that burden to a judge to decide whether or not the contested secrecy compiled with the undefined "reasonableness" standard.

If an agency head certified that classified material being withheld is properly classified, the judge—even after in camera examination—may only reject such certification by finding the withholding to be "without a reasonable basis" under the criteria of the Executive order authorizing governmentwide classification practices. There is no definition in the bill or the accompanying report of what such a reasonable basis would be.

I believe there is no reason to require the courts to accord such special status to cases involving classified secrets, as opposed to other types of sensitive information the Government seeks to withhold. The standard of full de novo review should be the same in all Freedom of Information Act cases.

Mr. President, I ask unanimous consent that a detailed memorandum further explaining the provisions of S. 2543 and my objections to subsection (b) (4) (B) (ii) be included in the RECORD at this point.

There being no objection, the memorandum was ordered to be printed in the RECORD, as follows:

BACKGROUND

On January 22, 1973, in *Environmental Protection Agency* v. *Patsy Mink*, the Supreme Court held that the Freedom of Information Act was so worded as to bar *in camera* judicial examination of documents which officials certified were exempt from disclosure as being "specifically required by Executive order to be kept secret in the interest of the national defense or foreign policy." (The first of the nine permissive exemptions in the act.) "We do believe," Justice White held for the six-member majority, "that Exemption 1 permits compelled disclosure of documents . . . classified pursuant to this Executive Order. Nor does the Exemption permit *in camera* inspection of such documents to sift out so-called 'non-secret components.' Obviously, this test was not the only alternative available. But Congress chose to follow the Executive's determination in these matters and that choice must be honored."

Later, in his opinion, Justice White added: "Congress could certainly have provided that the Executive Branch adopt new procedures or it could have established its own procedures—subject only to whatever limitations Executive privilege may be held to impose upon such congressional ordering." In his concurring opinion Justice Stewart held that Congress "has built into the Freedom of Information Act an exemption that provides no means to question an Executive decision to stamp a document 'secret,' however cynical, myopic, or even corrupt that decision might have been."

Responding to this decision—and the effect it had of denying Representative Mink and her co-plaintiffs access to classified information dealing with the controversy over the nuclear tests in the Aleutians—Senator Muskie and Representative Moorhead jointly introduced legislation which would have *required* in camera inspection of documents claimed to be exempt from disclosure under any of documents claimed to be exempt from disclosure under any of the nine exemptions. In the case of Exemption 1 claims, the original bill would have had judges, after in camera examination, "determine if such records, or any part thereof, cannot be disclosed because such disclosure would be harmful to the national defense or foreign policy of the United States." The thrust of this proposal, and of all the considerable dissatisfaction with the *Mink* ruling, was the conviction that someone other than the classifiers themselves—*i.e.*, judges—must look behind the fact of classification to weigh its validity.

In the version of the bill passed by the House the *requirement* for in camera inspection became specific permission ("*may* examine the contents of any agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b)."). Additionally, the language of the first exemption was changed by the insertion of the underlined words to make the Act not apply to matters: "(1) *authorized under criteria established by an* Executive order to be kept secret in the interest of the national defense or foreign policy."

The sponsors of the House bill (approved 383–8 on March 14, 1974) felt they had accomplished their purpose of overruling the *Mink* decision. John Moss, who sponsored the original FOI Act, said on the floor, "Two amendments to the Act included in this bill are aimed at increasing the authority of the courts to engage in a full review of agency action with respect to information classified by the Department of Defense, the Department of State, and other agencies under Executive order authority . . . *It is the intent of the committee that the Federal courts be free to employ whatever means they find necessary to discharge their responsibility.* This was also the intent in 1966 when Congress acted, but these two amendments contained in the bill before you today make it crystal clear." (Emphasis added.)

Provisions of S. 2543

As reported out of the Subcommittee on Administrative Practices and Procedures, S. 2543 was substantially parallel to the House provisions to permit in camera review without prescribing the standard to be used to conduct such review nor, in any detail, what weight to accord Executive Branch testimony as to the

legitimacy of a classification. "In such a case," the Subcommittee version of the bill said, "the court shall consider the case de novo, *with such in camera examination of the requested records as it finds appropriate* to determine whether such records or any part thereof may be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action." (Emphasis added.)

Additionally, S. 2543, as reported by both Subcommittee and Committee, amends Exemption 1 by adding the underlined words so that it reads: "(1) specifically required by an Executive order or *statute* to be kept secret in the interest of national defense or foreign policy *and are in fact covered by such order or statute.*" Even if the wording is different from the House bill in detail, the purpose of S. 2543, before amendment in full Committee, was obviously identical to the purpose of the House authors—to overrule *Mink* and leave the courts free to conduct in camera scrutiny of classified material, if judges found such examination necessary to their rendering a decision on the validity of the exemption claim.

Indeed, the draft report language in the Committee Print on S. 2543 of January 15, 1974, said, "By expressly providing for in camera inspection regardless of the exemption invoked by the government, S. 2543 would make clear the congressional intent—implied but not expressed in the original FOIA—as to the availability of in camera examination in all FOIA cases. *This examination would apply not just to the labeling but to the substance of the records involved.*" (P. 16, emphasis added.) Later (p. 28), the draft report added, "It is essential . . . to the proper workings of the Freedom of Information Act that any executive branch review, itself, be reviewable outside the executive branch. And the courts—when necessary, using special masters or expert consultants of their own choosing to help in such sophisticated determinations—are the only forums now available in which such review can properly be conducted."

While there is no indication in the full Committee report (No. 93-854 of May 16, 1974) of any roll-call or other vote in Committee changing the Subcommittee draft, S. 2543 as unanimously approved is a clean bill with an entire new subsection, 4(B)(ii), which would radically change the circumstances under which in camera review of classified material could be conducted. The new language in Exemption (1) is retained and the draft report language from page 28 now appears on page 31, but the effect of the new subsection is to foreclose de novo review of Exemption 1 cases and to introduce a new and special standard for court consideration of classified material.

When Exemption 1 is asserted, the bill provides, "a court may review the contested document in camera if it is unable to resolve the matter on the basis of affidavits and other information submitted by the parties. In conjunction with its in camera examination, the court may consider further argument, or an ex parte showing by the Government, in explanation of the withholding. If there has been filed in the record an affidavit by the head of the agency certifying that he has personally examined the documents withheld and has determined after such examination that they should be withheld under the criteria established by a statute or Executive order . . ., the court shall sustain such withholding unless, following its in camera examination, it finds the withholding is *without a reasonable basis* under such criteria." (Emphasis added.) The report on S. 2543 is frank to admit that these sentences scrap the premise that classified material can be treated, like other records, as presumptively exempt from disclosure. On page 16, the report says:

"This standard of review *does not allow the court to substitute its judgment for that of the agency*—as under a de novo review—but neither does it require the court to defer to the discretion of the agency, even if it finds the determination not arbitrary or capricious. Only if the court finds the withholding to be without a reasonable basis under the applicable Executive order or statute may it order the documents released." (Emphasis added.)

In short, before conducting an in camera examination of classified material, judges may weigh opposing arguments. Once they proceed to the in camera scrutiny, however, the Government gets special permission to make an ex parte showing in its own behalf. And if, for example, the head of the Export-Import Bank, where 13 officials now have classification authority or of the United States Information Agency (where 387 officials have original classification authority) or of any of the 23 other government agencies or 11 designated offices in the Executive Office of the President is willing personally to vouch for the propriety of a secrecy marking, judges may only overrule that voucher on the basis of an undefined reasonableness standard.

Objections to section 4(B)(ii) of S. 2543

1. The provisions of 4(B)(ii) are so weighted in favor of classification markings as to make it almost impossible for judges, even after conducting in camera review, to overrule any secrecy stamp the government wishes to keep in place. When a plaintiff seeks classified material, he is automatically at a disadvantage in arguing his case in that he cannot know the contents of the records he seeks and cannot show affirmatively that the public might benefit from their disclosure. In the FOIA generally, the burden of proof to sustain withholding is put on the government, but in dealing with classified material, the requester may have no effective way to dispute a government assertion: "It's secret, because it's secret." Thus, it is important for judges to use all the resources they can summon to judge the delicate matter of secrecy. S. 2543 would oblige them to give extra weight to official sources and, by inference, make it harder for them to employ outside experts, if such could be found.

2. This heavy presumption given official testimony perpetuates the almost mythical status of classified information as a category of secret exempt from the regular provisions of the FOIA. Review, the report makes clear, would not be de novo in Exemption 1 cases; it would be a special animal, as though documents marked Secret by the General Services Administration were automatically entitled to different consideration than those claimed to be "geological and geophysical information and data" by the Federal Power Commission (Exemption 9) or "trade secrets" by the Patent Office (Exemption 4).

3. It is inappropriate—if not obnoxious—to provide judges such detailed instructions on how to conduct their inquiry in a case before them. One wonders how the authors of 4(B)(ii) would react to statutory stipulations on the evidence admissible in a closed hearing on an accused juvenile delinquent or to such a weighting of the scales in favor of the government in an anti-trust proceeding. One also wonders at the apparent contempt shown for Federal judges in so narrowly demarcating the bounds of their conduct in cases which might conceivably deal with information on codes used in the Civil War—a subject area still treated as classified.

Recommendation

Section 4(B)(ii) should be struck from S. 2543. Without it, judges will be able—Federal courts conduct in camera review of classified documents they may find necessary to determining the propriety of a classification marking. They will be able to accord—and it should be assumed that faced with such a delicate task, they will accord—whatever weight is fitting to government arguments in favor of continued secrecy. But they will also be able, should they wish, to seek and give credence to the impartial counsel of qualified outsiders, not plaintiffs or defendants, to help them with their task. They will, in short, be able to behave like judges.

U.S. PARTICIPATION IN THE INTERNATIONAL DEVELOPMENT ASSOCIATION—AMENDMENT

AMENDMENT NO. 1355

(Ordered to be printed and to lie on the table.)

Mr. DOMINICK. Mr. President, I am today submitting for printing an amendment Senator McCLURE and I intend to offer to S. 2665, a bill to provide for increased participation by the United States in the International Development Association. The amendment addresses the right of our citizens to own gold.

In the way of a brief background, on April 4, 1973, Senator McCLURE offered an amendment to the Par Value Modification Act which stipulated that U.S. citizens could no longer be prevented from purchasing, selling, or owning gold. This amendment passed by a vote of 68 to 23. The gold ownership provision was amended in the House by the Banking and Currency Committee which struck the Senate specified enacting date of December 31, 1973 and substituted language which left it up to the President as to when gold ownership could go into effect.

An amendment offered on the floor of the House to restore the Senate language with a definite effective date failed on a tie vote. The conferees chose to accept the House language. The President subsequently signed the measure into law Public Law 93-110—thus restoring the right to own gold at a future unspecified time.

Shortly after this, the Senate again showed its desire to allow citizens to own and hold gold when I offered an amendment to S. 1141, the bicentennial coinage bill. My amendment again called for a specific date as to when gold ownership would be allowed. This amendment passed. When the House and the Senate met in conference on the coinage bill, the gold provision enactment date was once again stricken. Thus, on two separate actions the Senate has voted its overwhelming support of private gold ownership.

The amendment Senator McCLURE and I will offer to S. 2665 will amend the Par Value Act—Public Law 93-110—and allow citizens to own and hold gold as of September 1, 1974. The amendment is a simple one. It amends section 3(c) of Public Law 93-110 by deleting all of such subsection and inserting in its place:

The provisions of this section pertaining to gold shall take effect September 1, 1974.

Our amendment will restore a right taken away from the American people almost 40 years ago. In 1934, President Roosevelt ordered all Americans holding gold to turn it in to the Treasury. This was clearly an expropriation of private property, and it is time for this act to be